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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MARVIN MAGAT, Defendant and Appellant.	H039935 (Santa Clara County Super. Ct. No. C1239524)

Defendant Marvin Magat pleaded no contest to two counts of committing a lewd act on a child (Pen. Code, § 288, subd. (a)).[1] On May 29, 2013, the court suspended defendant's sentence and placed him on felony probation for three years under various terms and conditions, including the requirement that he pay a fine of $300 and penalty assessments of $735, pursuant to section 290.3. Thereafter, on July 19, 2013, the court imposed additional conditions.

On appeal, defendant challenges two conditions that were imposed under an amendment to section 1203.067 that became effective September 9, 2010 (the 2010 amendment). First, the court required defendant, pursuant to section 1203.067, subdivision (b)(3) (§ 1203.067(b)(3)), to "waive any privilege against self-incrimination and participate in polygraph examinations, which shall be part of the sex offender

[1] Further statutory references are to the Penal Code.

management program." And second, the court required defendant, pursuant to section 1203.067, subdivision (b)(4) (§ 1203.067(b)(4)), to "waive any psychotherapist/patient privilege to enable communication between the sex offender management professional and the Probation Officer." (Hereafter, these two conditions are sometimes collectively referred to as the sex offender management program conditions.) Defendant contends these two probation conditions may not lawfully be imposed in his case because the 2010 amendment to section 1203.067 became effective September 9, 2010, three years after the commission of his crimes, and the statute cannot be retroactively applied in his case. He asserts that application of the 2010 amendment to him is unlawful under ex post facto principles. He asserts further that the probation condition imposed pursuant to section 1203.067(b)(3) is constitutionally infirm insofar as it purports to compel his waiver of the privilege against self-incrimination guaranteed under the Fifth Amendment of the United States Constitution. And he contends the probation condition imposed pursuant to section 1203.067(b)(4), requiring a "blanket waiver" of the psychotherapist-patient privilege to enable communication between the sex offender management professional and the probation officer, is unreasonable and thus invalid under *People v. Lent* (1975) 15 Cal.3d 481 (*Lent*).[2]

Defendant also challenges a probation condition prohibiting him from living in a home in which children under 18 reside, because the condition does not require him to have knowledge of the presence of children under 18 years old in the home. Lastly, he challenges a condition requiring him to pay a fine of $300 and penalty assessments of

[2] The Supreme Court is currently considering the constitutionality of the conditions of probation mandated by section 1203.067(b) for persons convicted of specified felony sex offenses, including the waiver of the privilege against self-incrimination and waiver of the psychotherapist-patient privilege. (See *People v. Klatt*, review granted July 16, 2014, S218755; *People v. Friday*, review granted July 16, 2014, S218288; *People v. Garcia*, review granted July 16, 2014, S218197.)

$735, claiming there was no substantial evidence he had the ability to pay the fine and assessments as required under section 290.3.

We reject defendant's contention that application of the 2010 amendment to section 1203.067 violates ex post facto principles. We conclude, however, that the 2010 amendment to section 1203.067 must be construed as having prospective application to probationers whose crimes were committed on or after September 9, 2010, and therefore the court erred when it imposed upon defendant the sex offender management program conditions under the 2010 amendment. But in 2014, the Legislature once again amended the statute, effective September 26, 2014 (the 2014 amendment), making it clear that the sex offender management program conditions are required under defendant's circumstances, even though his crimes were committed before September 9, 2010. Therefore, rather than strike the conditions and remand the case for the court to perform its duty to impose them under the 2014 amendment, we will consider them to have been effectively imposed under the 2014 amendment and will address defendant's further challenges.

With respect to those challenges, we conclude the probation condition requiring a waiver of the privilege against self-incrimination is prohibited by the Fifth Amendment under *Minnesota v. Murphy* (1984) 465 U.S. 420 (*Murphy*). (See *People v. Rebulloza* (2015) 234 Cal.App.4th 1065 (*Rebulloza*).) We further construe the waiver of the psychotherapist-patient privilege imposed under section 1203.067(b)(4) as requiring waiver only insofar as necessary to enable communications between the sex offender management professional and the supervising probation officer. (*Ibid.*) As so construed, we hold the psychotherapist-patient privilege is not overbroad in violation of defendant's constitutional right of privacy. We will also direct that the residency condition be modified to require that defendant know or reasonably should know that there is a child (or there are children) living in the home who is/are under 18. Lastly, we will direct that the fine and assessments imposed under section 290.3 be stricken. We will remand the

case to the trial court with instructions to modify the orders of probation entered May 29 and July 19, 2013, as provided herein.

FACTS

A cousin of defendant reported to the police in June 2011 that approximately four years earlier, defendant had sexually abused her daughter and her (defendant's cousin's) niece. Defendant had been 16 years old at the time. Shortly thereafter, on July 6, 2011, a second person, Desiree Doe, reported to the police that at some time in the past, defendant was babysitting her and her cousin, Ashley Doe, at their grandmother's house. (At the time, Desiree was five or six, and Ashley was six or seven.) Desiree reported that defendant had instructed "them to kiss him 'or else' (implying that he would get them in trouble if they did not kiss him)." Defendant forced Desiree to kiss him on the lips, and he told her that something bad would happen to her if she reported it to anyone. It made her feel "really bad because [she] did not want to do that to him." He instructed Desiree to leave the room and she complied. Desiree told the arresting officer that she had not told anyone about the incident because she had been afraid and thought her mother would "tell everyone" what had happened.

On July 6, 2011, Ashley reported to the police that when she was six years old, defendant, who had been babysitting her and Desiree, had forced both of them to kiss him on the lips and "[s]he felt 'grossed out' " about doing it. He then told Desiree to leave, and he locked the door. Defendant took off his pants and underwear, lay down on the bed, and instructed Ashley to get on top of him and to move up and down on him while remaining clothed. She reported that "she felt 'grossed out' when she was on top of him." Defendant instructed Ashley not to tell anyone what had happened and that it would be their " 'deepest and darkest secret.' "

In an interview with the police on July 18, 2011, defendant admitted that when he was 14 years old, he had kissed Ashley three or four times. He said he had taken off his pants and thought he had become aroused. Defendant told the police that he had taken

off his clothes in Ashley's presence two or three times. On one occasion, he told her to take off her clothes and he touched her legs. He also instructed her to touch his penis for two or three minutes. He then lay on top of her on a couch but did not have sexual intercourse with her. His penis touched her vagina but he did not ejaculate. On another occasion, defendant took off his clothes, instructed Ashley to take off her clothes, and got on top of her. His penis touched her vagina but did not enter it. He told the police he had "realized what he was doing was wrong, so he did not go through with it." Ashley's brother saw them and told defendant to stop what he was doing.

PROCEDURAL BACKGROUND

In a complaint filed August 22, 2012, defendant was charged with four counts of lewd or lascivious acts upon a child by force, violence, duress, menace, or fear (§ 288, subd. (b)(1); count 1). The first two counts contained allegations that the victim was Ashley Doe and that the offenses occurred between January 1, 2007, and December 31, 2007. Counts 3 and 4 contained allegations that the victim was Desiree Doe and that the offenses occurred between January 1, 2007, and December 31, 2007.

On January 25, 2013, the District Attorney moved to amend the complaint to allege counts 1 and 3 as lewd acts on a child (§ 288, subd. (a)). Defendant waived a preliminary hearing and entered a plea of no contest to counts 1 and 3, as amended, conditioned upon the dismissal of the remaining counts and with the understanding that he would receive a maximum three-year prison sentence.

On May 29, 2013, the court suspended imposition of the sentence and placed defendant on probation for three years on various terms and conditions, including (1) serving one year in county jail, and (2) paying a fine of $300 and penalty assessments of $735, pursuant to section 290.3. At that time, the court dismissed counts 2 and 4. After receiving briefing in which defendant specifically objected to the imposition of the conditions under subdivisions (b)(3) and (b)(4) of section 1203.067, the court, on July 19, 2013, imposed the two sex offender management program conditions that are the subject

of this appeal. It also ordered defendant to pay all sex offender management participation fees as determined by the court, under subdivision (c) of section 1203.067.

DISCUSSION

I. Probation Conditions Under Section 1203.067(b),(c)

A. Defendant's Contentions

On appeal, defendant asserts four challenges to the imposition of the aforementioned probation conditions. First, he contends that applying the 2010 amendment to section 1203.067 retroactively to him "violates the ex post facto clause of the federal Constitution (U.S. Const., art. I § 10, cl. 1) and the California Constitution (Cal. Const., art. I, § 9)." Second, he argues that application of the conditions prescribed by section 1203.067(b), which were authorized as a result of the 2010 amendment to the statute, is an unlawful retroactive application of the law because the crimes of which he was convicted occurred three years before the effective date of that statutory amendment. Third, he asserts the probation condition imposed pursuant to section 1203.067(b)(3) is constitutionally infirm insofar as it purports to compel his waiver of the privilege against self-incrimination guaranteed under the Fifth Amendment of the United States Constitution. Lastly, he contends the probation condition imposed pursuant to section 1203.067(b)(4) requiring a "blanket waiver" of the psychotherapist-patient privilege to enable communication between the sex offender management professional and the probation officer "is not related to the crime and is unreasonable, and thus is invalid under *People v. Lent*, *supra*, 15 Cal.3d 481."

B. The 2010 Amendment to Section 1203.067

Prior to September 9, 2010, section 1203.067 did not require the court to impose as probation conditions for a sex offender that he or she waive any privilege against self-incrimination, participate in polygraph examinations, and waive any psychotherapist-patient privilege to enable communications between a sex offender management professional and the probation officer. Instead, the former statute provided that in the

event of a grant of probation, " '(b) . . . the court shall order the defendant to be placed in an appropriate treatment program designed to deal with child molestation or sexual offenders, if an appropriate program is available in the county. [¶] (c) Any defendant ordered to be placed in a treatment program pursuant to subdivision (b) shall be responsible for paying the expense of his or her participation in the treatment program as determined by the court. The court shall take into consideration the ability of the defendant to pay, and no defendant shall be denied probation because of his or her inability to pay.' " (*People v. Douglas M.* (2013) 220 Cal.App.4th 1068 (*Douglas M.*).)

Section 1203.067 was amended with an effective date of September 9, 2010, but the provisions of the 2010 amendment did not become operative until July 1, 2012. (§ 1203.067, amended by Stats. 2010, ch. 219 (A.B. 1844), § 17, eff. Sept. 9, 2010; § 1203.067, subd. (b).)[3] The 2010 amendment to section 1203.067 was enacted "as part of Assembly Bill 1844, the Chelsea King Child Predator Prevention Act of 2010 (Chelsea's Law) (Stats. 2010, ch. 219), which altered numerous statutes governing sex offenses and sex offenders." (*Douglas M.*, at p. 1076.)

C. 2010 Amendment Does Not Violate Ex Post Facto Principles

Defendant argues that to the extent the 2010 amendment may be construed as applying in his case—where his crimes were committed before the amendment's effective date—it "violates the ex post facto clause of the federal Constitution (U.S. Const., art. I, § 10, cl. 1) and the California Constitution (Cal. Const., art. I, § 9)." We disagree.

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[3] " ' "The effective date [of a statute] is . . . the date upon which the statute came into being as an existing law." [Citation.] "[T]he operative date is the date upon which the directives of the statute may be actually implemented." [Citation.] Although the effective and operative dates of a statute are often the same, the Legislature may "postpone the operation of certain statutes until a later time." [Citation.]' [Citation.]" (*People v. Alford* (2007) 42 Cal.4th 749, 753, fn. 2. (*Alford*).)

The ex post facto clause of the United States Constitution prohibits retrospective legislation that increases the punishment for a crime subsequent to its commission. (*People v. McVickers* (1992) 4 Cal.4th 81, 84 (*McVickers*).) But a change in the law that simply operates to the disadvantage of the defendant or constitutes a burden is not necessarily unlawful under the ex post facto prohibition. (*Collins v. Youngblood* (1990) 497 U.S. 37, 50.) We apply federal constitutional analysis in determining whether a law violates the California Constitution analog. (*Tapia v. Superior Court* (1991) 53 Cal.3d 282, 295.)

In determining whether a law constitutes punishment under an ex post facto analysis, we look to "whether the Legislature intended the provision to constitute punishment and, if not, whether the provision is so punitive in nature or effect that it must be found to constitute punishment despite the Legislature's contrary intent." (*People v. Castellanos* (1999) 21 Cal.4th 785, 795, fn. omitted.) In enacting the 2010 amendment, it does not appear the Legislature's intent was to enhance punishment for convicted sex offenders. The 2010 amendment amended the Sex Offender Punishment, Control, and Containment Act of 2006 (hereafter, the "Containment Act"). (Stats. 2010, ch. 219, § 17.) The Containment Act created "a standardized, statewide system to identify, assess, monitor and contain known sex offenders for the purpose of reducing the risk of recidivism posed by these offenders, thereby protecting victims and potential victims from future harm." (Pen. Code, § 290.03, subd. (b), Stats. 2006, ch. 337, § 12.) The Containment Act requires participation in an "approved sex offender management program" certified by the California Sex Offender Management Board (CASOMB). (Pen. Code, § 9003.) It is readily apparent from a review of the 2010 amendment that it was intended to reduce recidivism, aid in the treatment of sex offenders subject to the sex offender management program, and promote public safety. These goals constitute "legitimate nonpunitive governmental purpose[s]," and "[i]n the absence of any additional punitive purpose or significant punitive effect, this nonpunitive purpose

removes the statute from the ambit of the ex post facto clause." (*McVickers*, *supra*, 4 Cal.4th at p. 89.) Legislation of the same or a similar nature has been previously held to be nonpunitive and therefore not an ex post facto violation. (See *Smith v. Doe* (2003) 538 U.S. 84, 105-106 [retroactive application of registration for convicted sex offenders not ex post facto violation]; *Kansas v. Hendricks* (1997) 521 U.S. 346, 362-363, 369 [retroactive application of civil commitment proceedings after completion of criminal sentence not ex post facto violation]; *McVickers*, at p. 89 [retroactive application of AIDS testing to persons convicted of specified sex offenses was not ex post facto violation].)

Defendant's reliance on *People v. Delgado* (2006) 140 Cal.App.4th 1157 (*Delgado*) is misplaced. The 2010 amendment, unlike the legislation that was found to violate ex post facto principles in *Delgado*, did not increase the mandatory length of the probation term. (See *id.* at p. 1170.) Further, a probationer under the pre-2010 amendment, like a probationer after the effective date of the amendment, was required to participate in and pay for sex offender treatment.

We conclude the 2010 amendment did not violate the ex post facto clauses of either the federal or state constitutions.

D. 2010 Amendment to Section 1203.067 Has Prospective Application

We next address whether, as a matter of statutory interpretation, the 2010 amendment should be construed as applying prospectively or retroactively. In *Douglas M.*, *supra*, 220 Cal.App.4th 1068, the First District Court of Appeal considered the following question: Does the 2010 amendment to section 1203.067 apply retroactively to impose conditions specified under subdivisions (b)(3) and (b)(4) to a probationer whose crimes were committed before September 9, 2010? The *Douglas M.* court answered the

question in the negative. The Attorney General asserts *Douglas M.* is distinguishable and "wrongfully [*sic*] decided."[4]

The defendant in *Douglas M.* was convicted of two counts of lewd and lascivious acts upon a child (§ 288, subd. (a)) occurring between July 2005 and June 2006. (*Douglas M.*, *supra*, 220 Cal.App.4th at p. 1071.) In 2009, the defendant was placed on probation for seven years. (*Ibid.*) In 2012, over the defendant's objection, the trial court modified the terms and conditions of his probation in accordance with the 2010 amendment to include his mandatory (1) participation in an approved sex offender program; (2) submission to random polygraph examinations with a concomitant waiver of the privilege against self-incrimination; and (3) waiver of the psychotherapist-patient privilege to enable communications between a sex offender management professional and the probation officer. (*Id.* at pp. 1071, 1073.) The *Douglas M.* court held that the court had erred in imposing these additional terms and conditions because the 2010 amendment could not be construed to apply retroactively to convicted sex offenders receiving grants of probation for crimes committed before September 9, 2010. (*Id.* at pp. 1075-1078.)

The court in *Douglas M.* commenced its analysis by referring to general principles of statutory construction concerning whether a law has prospective or retroaction application. (*Douglas M.*, *supra*, 220 Cal.App.4th at p. 1075.) It analyzed section 3 of the Penal Code, as follows: "Section 3 provides: 'No part of [the Penal Code] is retroactive, unless expressly so declared.' Our Supreme Court has 'described section 3, and its identical counterparts in other codes (e.g., Civ. Code, § 3; Code Civ. Proc., § 3), as codifying "the time-honored principle . . . that in the absence of an express

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[4] As we discuss, *post*, the Legislature amended section 1203.067 again in legislation signed by the Governor on September 26, 2014, more than one year after the court's imposition of probation in this case. (See Stats. 2014, ch. 611, p. 4144.) For reasons we will discuss, it is the 2010 amendment to the statute that controls our analysis of defendant's contention that imposition of the probation conditions to him was invalid.

retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature . . . must have intended a retroactive application." [Citations.] In applying this principle, we have been cautious not to infer retroactive intent from vague phrases and broad, general language in statutes. [Citations.] Consequently, " 'a statute that is ambiguous with respect to retroactive application is construed . . . to be unambiguously prospective.' " [Citations.]' [Citations.]" (*Ibid.*, quoting *People v. Brown* (2012) 54 Cal.4th 314, 319-320 (*Brown*).)

The *Douglas M.* court rejected the People's claim that the Legislature expressed an intent that the 2010 amendment be applied retroactively, concluding that the People's "interpretation . . . completely ignores both section 3's presumption of prospectivity and the context in which the amendment of section 1203.067 came about." (*Douglas M., supra,* 220 Cal.App.4th at pp. 1075-1076.) The court observed that "[a]lthough the bill was enacted in September 2010 as urgency legislation, intended to take effect immediately [citation], the section 1203.067 amendments did not become operative until July 2012, almost two years later. The apparent reason for this delayed implementation is reflected in other stated requirements of the bill (see, e.g., § 9003 [requiring development and updating of standards for certification of sex offender management professionals and programs]), which were prerequisites to application of the new provisions of section 1203.067." (*Ibid.*, fn. omitted.)

The court concluded: "[T]here is nothing in either the language of the statute or its legislative history clearly indicating a legislative intent for revised section 1203.067 to be applied retroactively to probationers whose crimes occurred before its effective date [Citation.] . . . Therefore, in keeping with the mandate of section 3, the amended statute must be viewed as 'unambiguously prospective,' applying to probationers who committed their crimes on or after the statute's effective date of September 9, 2010. [Citation.] Because appellant's offense occurred before September 9, 2010, the

provisions of revised section 1203.067 were improperly applied to him and must be stricken." (*Douglas M.*, *supra*, 220 Cal.App.4th at pp. 1077-1078.)

The Attorney General argues that *Douglas M.* is distinguishable because there, "the defendant had originally been placed on probation in 2006, and after successfully completing six years of probation, the trial court modified his probation in October 2012, pursuant to section 1203.067, *subdivision (b)(1)*." (Original italics.) It is true that—unlike defendant here, in which the challenged terms and conditions were imposed in the first instance when he was granted probation—the defendant in *Douglas M.* had successfully completed most of his probationary term before the court amended its order to include the challenged terms and conditions under the 2010 amendment. And it is also true that the terms and conditions of probation in *Douglas M.* were amended under subdivision (b)(1) to require his *participation* in an approved sex offender management program, while defendant here was ordered under subdivision (b)(2) of the statute to *successfully complete* a sex offender management program. But the reasoning of the court in *Douglas M.* is equally applicable here, notwithstanding these factual differences.

We find the reasoning of *Douglas M.* persuasive, and we conclude that the 2010 amendment to section 1203.067 cannot be given retroactive application to probationers whose crimes were committed before September 9, 2010. Accordingly, the court erred in imposing the probation conditions specified in subdivisions (b)(3) and (b)(4) of section 1203.067 under the 2010 amendment.

E. Application of the 2014 Amendment to Section 1203.067

After briefing in this case was completed, the Legislature once again amended section 1203.067. In legislation effective September 26, 2014, the statute was amended to include the following sentence at the end of both subdivisions (b)(1) and (b)(2): "Participation in this program applies to each person without regard to when his or her crime or crimes were committed." (See Stats. 2014, ch. 611, p. 4144.) We requested supplemental briefing from the parties to address the potential effect of the 2014

amendment upon defendant's challenges to the probation conditions imposed under section 1203.067. After considering the parties' supplemental briefs, we conclude that although the court erred in imposing the sex offender management program probation conditions under the 2010 amendment, it was required to impose those conditions under the 2014 amendment.

Section 1203.067, subdivision (b) now provides that on or after July 1, 2012, for all persons placed on formal probation for any crime requiring sex offender registration (§ § 290 to 290.023), the terms of probation *shall* include: "[(2)] successful[] complet[ion of] a sex offender management program, following the standards developed pursuant to Section 9003, as a condition of release from probation. The length of the period in the program shall be not less than one year, up to the entire period of probation, as determined by the certified sex offender management professional in consultation with the probation officer and as approved by the court. *Participation in this program applies to each person without regard to when his or her crime or crimes were committed.* [¶] (3) Waiver of any privilege against self-incrimination and participation in polygraph examinations, which shall be part of the sex offender management program. [¶] (4) Waiver of any psychotherapist-patient privilege to enable communication between the sex offender management professional and supervising probation officer, pursuant to Section 290.09." (Italics added.)

Defendant was placed on probation for registrable sex offenses after July 1, 2012. Under the current version of the statute, he is subject to the mandatory provisions of subdivision (b)(2) through (4) of section 1203.067, even though his crimes were committed before the effective date of the 2010 amendment. Accordingly, it would serve no purpose to strike the sex offender management program probation conditions imposed under the 2010 amendment only to remand this matter to the trial court to impose those same conditions under the 2014 amendment. We will therefore deem the conditions

imposed under the 2014 amendment and will address defendant's remaining challenges to them.[5]

F. Waiver of Privilege Against Self-Incrimination

Defendant argues that the probation condition imposed pursuant to section 1203.067(b)(3), requiring his waiver of "any privilege against self-incrimination and participat[ion] in polygraph examinations," is unconstitutional. He contends that under *Murphy*, *supra*, 465 U.S. 420, it is unlawful for the state to compel a defendant to waive his Fifth Amendment privilege against self incrimination as a term of probation. The Attorney General responds that section 1203.067(b)(3) lawfully compels defendant, as a condition of probation, to waive the privilege against self-incrimination. She contends the Fifth Amendment privilege simply precludes the use of evidence obtained as a result of that compulsory waiver in a subsequent prosecution against defendant.

This court recently addressed this question in *Rebulloza*, *supra*, 234 Cal.App.4th 1065. There, as here, the defendant, after pleading no contest to one count of indecent exposure charged as a felony based on a prior conviction for indecent exposure (§ 314, subd. (1)), was granted probation that included the sex offender management program conditions. (*Rebulloza*, at pp. 1069-1070.) Rebulloza challenged the condition imposed under 1203.067(b)(3) as violating his Fifth Amendment privilege against self-incrimination and as being overly broad. (*Rebulloza*, at p. 1070.) There, as here, the Attorney General asserted that section 1203.067(b)(3) did not violate the defendant's Fifth Amendment rights because the compulsory waiver under the statute was necessary to the probationer's participation in the sex offender management program and the Fifth Amendment prohibited only the use of the probationer's compelled

[5] As noted, *ante*, the 2010 amendment to section 1203.067 did not violate the ex post facto clauses of either the federal or state constitutions. Although defendant has not argued that the 2014 amendment of the statute is unconstitutional under the federal and state ex post facto clauses, such argument would similarly lack merit if made.

statements in a subsequent prosecution. (*Rebulloza*, at p. 1072.) We held that "a waiver of all privileges under the Fifth Amendment is neither necessary nor constitutional as a means to further the purposes of the sex offender management program." (*Id.* at pp. 1072-1073.)

In construing the statute, we found that section 1203.067(b)(3) compelled a waiver of the probationer's rights under the Self-Incrimination Clause of the Fifth Amendment and, further, that a " 'core' right under this clause is a criminal defendant's right not to have his officially compelled statements used against him in a criminal proceeding. [Citations.]" (*Rebulloza*, *supra*, 234 Cal.App.4th at p. 1073.) We also found that "by requiring the probationer to waive this core right, section 1203.067(b)(3) would allow the state to use the probationer's compelled statements against him in a criminal proceeding." (*Ibid*.) In so finding, we disagreed with the Attorney General's position that the waiver required by the statute was constitutional because the state could never use a probationer's compelled statements against him or her in a criminal proceeding. We reasoned that "[t]his argument is fundamentally at odds with the language of the statute. Because the Fifth Amendment is a right against the use of compelled statements in a criminal proceeding, it necessarily follows that a waiver of that right would *allow* for the use of probationers' compelled statements in criminal proceedings." (*Id*. at p. 1074, original italics.)

In determining whether section 1203.067(b)(3) was constitutional, we discussed at length the United States Supreme Court's decision in *Murphy*, *supra*, 465 U.S. 420. First, we noted that the high court "began its analysis by holding that the privilege against self-incrimination applies to probationers." (*Rebulloza*, *supra*, 234 Cal.App.4th at p. 1076, citing *Murphy*, at p. 426.) "The [*Murphy*] court then held that the probation condition requiring Murphy to answer questions truthfully did not, by itself, controvert this right; rather, his obligations were no different from those of any other witness in a proceeding: 'The answers of such a witness to questions put to him are not compelled

within the meaning of the Fifth Amendment unless the witness is required to answer *over his valid claim of the privilege*.' [Citation.]" (*Rebulloza*, at p. 1077, quoting *Murphy*, at p. 427.) In *Murphy*, the court concluded "that if the state had threatened to revoke Murphy's probation for invoking the Fifth Amendment, this threat would have violated the Fifth Amendment, and his statements would have been inadmissible at trial. [Citation.]" (*Rebulloza*, at p. 1077, citing *Murphy*, at p. 435.)

We summarized: "Thus, *Murphy* has long made clear that the state may not punish a probationer for invoking the Fifth Amendment. More recently, California courts have reaffirmed that *Murphy* stands for this principle. '[I]f the state puts questions to a probationer that call for answers that would incriminate him in a pending or later criminal proceeding, and expressly or by implication asserts that invocation of the privilege would lead to revocation of probation, the answers would be deemed compelled under the Fifth Amendment and thus involuntary and inadmissible in a criminal prosecution.' (*Brown v. Superior Court* (2002) 101 Cal.App.4th 313, 320.) Furthermore, a threat to revoke probation for *failing to waive* the privilege against self-incrimination is tantamount to a threat to revoke probation for a 'legitimate exercise of the Fifth Amendment privilege.' (*Murphy*, *supra*, 465 U.S. at p. 438.) *Murphy* thereby prohibits the compelled waiver required by section 1203.067(b)(3)." (*Rebulloza*, *supra*, 234 Cal.App.4th at p. 1077; see also *State v. Eccles* (Ariz. 1994) 877 P.2d 799, 800-801 [probation condition requiring waiver of any self-incrimination rights by truthfully answering all questions of probation officers, counselors, or polygraph examiners held unconstitutional].)[6]

[6] We also addressed in *Rebulloza* the defendant's contention—one defendant does not make here—that the waiver required under section 1303.067(b)(3) was unconstitutionally overbroad, concluding that the condition was in fact overly broad with respect to the defendant's Fifth Amendment constitutional rights. (*Rebulloza, supra*, 234 Cal.App.4th at pp. 1078-1083.)

Accordingly, following *Rebulloza*, we hold that the probation condition imposed here pursuant to section 1203.067(b)(3), under which defendant must "waive any privilege against self-incrimination and participate in polygraph examinations, which shall be part of the sex offender management program," is unconstitutional The condition is unconstitutional in that it compels defendant to waive his privilege against self-incrimination under the Fifth Amendment, which includes his " 'core' right . . . not to have his officially compelled statements used against him in a criminal proceeding. [Citations.]" (*Rebulloza*, *supra*, 234 Cal.App.4th at p. 1073.)

G. Waiver of Psychotherapist-Patient Privilege

The trial court here also required defendant, pursuant to section 1203.067(b)(4), to "waive any psychotherapist/patient privilege to enable communication between the sex offender management professional and the Probation Officer." In defendant's opening brief, he argues that "[t]his requirement for a blanket waiver is not related to the crime and is unreasonable, and thus is invalid under *People v. Lent*, *supra*, 15 Cal.3d 481." He asserts that the condition abridges the statutory psychotherapist-patient privilege under Evidence Code section 1014, a privilege which is to be construed broadly in the patient's favor. (*Story v. Superior Court* (2003) 109 Cal.App.4th 1007, 1014.) And he contends that the condition is invalid under the three-prong test in *Lent*, *supra*, 15 Cal.3d at page 1121, because it (1) has no relationship to the crime of which he was convicted; (2) relates to conduct (a psychotherapy session) which is not itself criminal; and (3) requires conduct (waiver of the psychotherapist-patient privilege) which is not related to future criminality.

In defendant's reply brief, he abandons the position that the condition imposed under section 1203.067(b)(4) is invalid and should be stricken in its entirety. Instead, he urges that the condition be deemed valid, but only "to the extent necessary to allow communication between the sex offender management professional and the supervising probation officer."

In *Rebulloza*, *supra*, 234 Cal.App.4th 1065, we recently addressed the validity of a probation condition imposed under section 1203.067(b)(4). We noted that "[t]he California Supreme Court has recognized that communications between a patient and psychotherapist are protected by a psychotherapist-patient privilege based on the federal constitutional right to privacy. 'The psychotherapist-patient privilege has been recognized as an aspect of the patient's constitutional right to privacy.' [Citation.]" (*Rebulloza*, at p. 1085, quoting *People v. Stritzinger* (1983) 34 Cal.3d 505, 511 (*Stritzinger*).) Acknowledging "that 'the right to privacy is not absolute, but may yield in the furtherance of compelling state interests' [citation]" (*Rebulloza* at p. 1086, citing *Stritzinger*, *supra*, at p. 511), we found the state has a legitimate and substantial interest in furthering communication between the sex offender management professional and the supervising probation officer to facilitate the professional's providing the probation officer (1) "with the probationer's scores on the SARATSO risk assessment tools," and (2) information concerning "the probationer's 'progress in the program and dynamic risk assessment issues.' [Citation.]" (*Rebulloza*, at p. 1088.) We held this interest was "sufficiently substantial . . . to justify disclosure . . . " (*Ibid*.)

In determining whether the scope of the psychotherapist-patient waiver provided in section 1203.060(b)(4) was properly tailored to address the state's interest, we concluded that it was not. "Similar to the broad language used in the waiver of the privilege against self-incrimination, the language of the statute, read literally, requires the waiver of 'any psychotherapist-patient privilege,' regardless of the subject matter of the communication or the level of risk to public safety absent disclosure. The waiver does not distinguish between comparatively more dangerous or less dangerous probationers. But unlike the language of the waiver of the privilege against self-incrimination, this broad language is followed by the phrase 'to enable communication between the sex offender management professional and supervising probation officer, pursuant to Section 290.09.' This additional language limits what may be done with the

probationer's communications once they are revealed. [¶] We will therefore narrowly construe the statute as requiring a waiver of the psychotherapist-patient privilege only insofar as it is necessary 'to enable communication between the sex offender management professional and supervising probation officer. . . .' ([Pen. Code,]§ 1203.067, subd. (b)(4).) Specifically, we hold that defendant may constitutionally be required to waive the psychotherapist-patient privilege only to the extent necessary to allow the sex offender management professional to communicate with the supervising probation officer. Furthermore, the supervising probation officer may communicate defendant's scores on the SARATSO risk assessment tools to the Department of Justice to be made accessible to law enforcement as required under section 290.09, subdivision (b)(2)." (*Rebulloza*, *supra*, 234 Cal.App.4th at pp. 1088-1089.)

We will likewise order the probation condition imposed upon defendant here pursuant to section 1203.067(b)(4) to be construed as stated in *Rebulloza*, *supra*, 234 Cal.App.4th at pages 1088 to 1089.

II. Probation Condition Concerning Living in Home with Children

One of the probation conditions imposed by the court provided: "The defendant [shall] not reside in a home where children under the age of 18 years reside." Defendant contends on appeal that the "probation condition is invalid because it lacks a knowledge requirement." He asserts the condition is therefore "unconstitutionally vague." Although defendant did not assert this challenge below, such a constitutional challenge to a probation condition may be raised for the first time on appeal. (See *In re Sheena K.* (2007) 40 Cal.4th 875, 885-887.) The Attorney General concedes the issue.

In *People v. Moses* (2011) 199 Cal.App.4th 374, 378 (*Moses*), the defendant challenged a similar probation condition on the basis that it was unconstitutionally vague

because it did not include a knowledge requirement.[7] The appellate court ordered the probation condition modified (*ibid.*) to include the language (italicized here) requiring scienter on the part of defendant, namely, "[d]o not reside with any person *you know or reasonably should know to be* under the age of 18 . . ." (*Id.* at p. 382, italics added; see also *People v. Turner* (2007) 155 Cal.App.4th 1432, 1436 [probation condition prohibiting association with persons under 18 modified to include knowledge requirement].)

A probation condition " 'must be sufficiently precise for the probationer to know what is required of him [or her], and for the court to determine whether the condition has been violated,' if it is to withstand a [constitutional] challenge on the ground of vagueness. [Citation.]" (*In re Sheena K.*, *supra*, 40 Cal.4th at p. 890.) As this court has observed, "[I]n a variety of contexts . . ., California appellate courts have found probation conditions to be unconstitutionally vague or overbroad when they do not require the probationer to have knowledge of the prohibited conduct or circumstances." (*People v. Kim* (2011) 193 Cal.App.4th 836, 843.)

We will therefore order the probation condition modified to include a specific knowledge requirement. (*Sheena K.*, *supra*, 40 Cal.4th at p. 892 ["modification to impose an explicit knowledge requirement is necessary to render [a probation] condition constitutional"]; see *Moses*, *supra*, 199 Cal.App.4th at p. 382.) The challenged probation condition shall be modified to read (with the modification italicized): "The defendant shall not reside in a home where he *knows or reasonably should know* children under the age of 18 years reside."

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[7] The probation condition in *Moses* read: " 'Do not reside with any person under the age of eighteen, including but not limited to your natural children, stepchildren, or any child with whom you have a parenting, guardianship or supervisory relationship, unless approved in advance and in writing by your probation officer.' " (*Moses*, *supra*, 199 Cal.App.4th at p. 378.)

III. Imposition of Fine and Penalty Assessments

Before the court entered its probation order on May 29, 2013, defense counsel urged that the court impose "minimal fines and fees" due to defendant's lack of financial resources. After acknowledging counsel's position, the court ordered, among other things, that defendant pay a fine of $300 and penalty assessments of $735, pursuant to section 290.3. It made no express finding and conducted no inquiry concerning whether defendant had the ability to pay these amounts.

Defendant contends the court erred in imposing the fine and penalty assessments under section 290.3 without determining, based upon substantial evidence, whether defendant had the ability to pay them. The Attorney General responds that from "the current record, this Court should presume that the trial court knew the applicable law and made an implied finding of ability to pay the section 290.3 fine."

Under section 290.3, the court is required to impose a statutory fine unless it finds a defendant is unable to pay it. (*People v. McMahan* (1992) 3 Cal.App.4th 740, 749 (*McMahan*).)[8] The burden is upon the defendant to timely raise an objection to the imposition of a fine under section 290.3 on the basis of his or her inability to pay. (*McMahan*, at p. 749-750.) The court is not required to make express findings on the record in deciding to impose, or to not impose, a fine under section 290.3. (*People v. Burnett* (2004) 116 Cal.App.4th 257, 261 (*Burnett*).) "Section 290.3 does not limit the evidence the trial court may consider in determining a defendant's ability to pay the sex offender fine. Consequently, the trial court may consider all evidence relevant to ability

[8] "Every person who is convicted of any offense specified in subdivision (c) of Section 290 shall, in addition to any imprisonment or fine, or both, imposed for commission of the underlying offense, be punished by a fine of three hundred dollars ($300) upon the first conviction or a fine of five hundred dollars ($500) upon the second and each subsequent conviction, unless the court determines that the defendant does not have the ability to pay the fine." (§ 290.3, subd. (a).)

to pay, including the amount of any fine or restitution ordered and the defendant's potential future income. Following a consideration of the facts and after concluding the defendant does not have the ability to pay, the trial court may properly decline to impose the sex offender fine." (*Id.* at p. 261.)

The court here did not make a finding that defendant had the ability to pay the fine under section 290.3. We may, of course, imply such a finding. (*Burnett, supra,* 116 Cal.App.4th at p. 261.) And while "we must draw all reasonable inferences in favor of the [order] [Citation.]" (*People v. Mercer* (1999) 70 Cal.App.4th 463, 467), there must be substantial evidence to support the implied finding.

Defense counsel, in urging the court "in the interest of justice . . . to lower or strike the fees that [are] within its power to do," made an offer of proof regarding defendant's indigence. She indicated that defendant was living with his sister, who was supporting him financially because he had lost his job when he was taken into custody. She also stated that defendant was unemployed, had no means of support, had no savings, and was financially dependent on his sister. It was also noted in the probation officer's report that defendant did not have a high school diploma. The court acknowledged counsel's position by stating, "I appreciate that." It did not cite any evidence rebutting defense counsel's offer of proof that defendant was without assets or income, and the prosecution submitted nothing in response on the issue. Nor does anything in the probation officer's report indicate that defendant had any income, assets, employment, or employment prospects. There was thus no substantial evidence to support the trial court's implied finding of defendant's ability to pay the fees.

The circumstances here are analogous to those in *People v. Pacheco* (2010) 187 Cal.App.4th 1392 (*Pacheco*).[9] In *Pacheco,* this court was concerned with an implied

[9] *Pacheco, supra,* 187 Cal.App.4th 1392, was disapproved on other grounds in *People v. McCullough* (2013) 56 Cal.4th 589, 599.

finding of the defendant's ability to pay relating to the payment of attorney fees under section 987.8. A panel of this court concluded that, while the court's finding of the defendant's ability to pay could be implied, it nonetheless "must be supported by substantial evidence. [Citations.]" (*Pacheco*, at p. 1398.) Because there was nothing in the record concerning the defendant's "assets, employment status or other means of income from which the court could have made a determination of his ability to pay attorney fees as provided by section 987.8," the attorney fee order was reversed. (*Id.* at p. 1399.)

Likewise, here, there is no evidence refuting defense counsel's offer of proof regarding her client's indigence. There was thus no substantial evidence to support the court's implied finding of defendant's ability to pay the fine and assessments levied under section 290.3.

DISPOSITION

The orders of probation dated May 29 and July 19, 2013, are reversed and the matter is remanded to the trial court with directions that it (1) strike the fine of $300 and penalty assessments of $735 imposed pursuant to section 290.3; (2) strike the language of the condition imposed pursuant to section 1203.067(b)(3) reading "waive any privilege against self-incrimination and"; and (3) modify the condition restricting where defendant resides to read "The defendant shall not reside in a home where he knows or reasonably should know children under the age of 18 years reside."

Márquez, J.

RUSHING, P.J., Concurring

I agree with the majority opinion that defendant cannot be compelled to waive his immunity against self-incrimination, although he can be compelled to answer potentially incriminating questions, on pain of revocation of probation, so long as his answers cannot be used against him. I diverge somewhat from the majority opinion's approach, however, concerning the effect of defendant's statutorily required waiver of the psychotherapist-patient privilege. I believe California's express guarantee of the right of privacy (Cal. Const., art. I, § 1) compels a rule under which the waiver required by Penal Code section 1203.067, subdivision (b), permits the "sex offender management professional" to report to the probation officer upon the defendant's test scores, attendance, and general cooperativeness in the therapy process, but does not otherwise permit the professional to disclose, to the probation officer or anyone else, the content of any otherwise protected psychotherapeutic communications. To the extent Penal Code section 1203.067 may be understood or intended to require or permit disclosure of such communications, I would hold it violative of our state constitutional guarantee of privacy.

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RUSHING, P.J.

ELIA, J., Concurring and Dissenting

I agree with Justice Marquez's conclusion that the 2010 amendment to Penal Code section 1203.067[1] does not violate the ex post facto clauses of either the federal or state Constitutions. Further, I agree that the 2010 amendment to section 1203.067 has prospective application only, but that the 2014 amendment to section 1203.067 can be applied to defendant. Moreover, I agree that the probation condition requiring that defendant not reside in a house where children under the age of 18 years reside must be modified to include a knowledge requirement. Finally, I agree that there is no substantial evidence in the record to support even an implied finding that defendant has the ability to pay the fine and assessments levied under section 290.3.

Respectfully, however, I disagree with the majority's conclusion that the probation condition requiring defendant to waive the privilege against self incrimination (§ 1203.067, subdivision (b)(3)) is prohibited by the Fifth Amendment to the United States Constitution under *Minnesota v. Murphy* (1984) 465 U.S. 420 (*Murphy*), and that therefore this court must strike the condition. (Maj. opn. at p. 3.) In addition, I would not narrowly construe the waiver of the psychotherapist-patient privilege as does the majority. (Maj. opn. at pp. 3, 19-20)

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." However, the Fifth Amendment does not prohibit a state from requiring a prospective probationer to choose between accepting this waiver and going to prison. This is true because the probation condition requiring defendant to waive the privilege against self incrimination does not *itself* compel a probationer to be a witness against himself in *a criminal proceeding.* This condition requires only that the probationer provide *full disclosures* in connection with the sex offender management

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[1] All unspecified section references are to the Penal Code.

program. Such disclosures are necessary to the success of the program. The waiver provision is critical because it prevents a probationer from refusing to provide such disclosures on self-incrimination grounds.

In *Murphy*, *supra*, 465 U.S. 420, Murphy had been placed on probation for a sexual offense. His probation terms required him to participate in a sex offender treatment program and to be "truthful with the probation officer 'in all matters.' " (*Murphy*, at p.422.) A counselor in the treatment program told the probation officer that Murphy had admitted an unrelated rape and murder. (*Murphy*, at p. 423.) The probation officer confronted Murphy about these admissions. (*Murphy*, at pp. 423-424.) Again, Murphy admitted the rape and murder. (*Murphy*, at p. 424.) Thereafter, Murphy was charged with murder, and he sought to suppress his admissions to the probation officer on Fifth Amendment grounds. (*Murphy*, at pp. 424-425.) The Minnesota Supreme Court held that, because the defendant was required to respond truthfully to the probation officer, the probation officer was required to inform the defendant of his Fifth Amendment rights before questioning him, and her failure to do so merited suppression of his admissions. (*Murphy*, at p. 425.)

The United States Supreme Court granted certiorari to decide "whether a statement made by a probationer to his probation officer without prior warnings is admissible in a subsequent criminal proceeding." (*Murphy*, *supra*, 465 U.S. at p. 425.) The Supreme Court concluded that the "general rule" is that the Fifth Amendment privilege against self-incrimination is not "self-executing." (*Murphy*, at p. 434.) A privilege that is not "self-executing" applies only where it has been invoked. (*Ibid*.) Murphy had not invoked the privilege because he did not "assert the privilege rather than answer" the probation officer's questions. (*Murphy*, at p. 429.) The court rejected Murphy's claim that his obligation under the terms of his probation to truthfully answer his probation officer's questions alone converted his "otherwise voluntary" responses into

compelled statements. (*Murphy*, at p. 427.) Analogizing Murphy's situation to that of a subpoenaed witness who testifies on pain of contempt, the court observed that "[t]he answers of such a witness to questions put to him are not compelled within the meaning of the Fifth Amendment unless the witness is required to answer over his valid claim of the privilege." (*Ibid.*) "If he asserts the privilege, he 'may not be required to answer a question if there is some rational basis for believing that it will incriminate him, at least without *at that time* being assured that neither it nor its fruits may be used against him' in a subsequent criminal proceeding. [Citation.] But if he chooses to answer, his choice is considered to be voluntary since he was free to claim the privilege and would suffer no penalty as the result of his decision to do so." (*Murphy*, at p. 429.)

In *Murphy*, the United States Supreme Court considered the applicability of the "penalty exception" to the general rule that the Fifth Amendment is not "self-executing." The penalty exception applies where the State not only compelled the person's statements but also "sought to induce him to forgo the Fifth Amendment privilege by threatening to impose economic or other sanctions 'capable of forcing the self-incrimination which the Amendment forbids.' " (*Murphy*, *supra*, 465 U.S. at p. 434.) "A State may require a probationer to appear and discuss matters that affect his probationary status; such a requirement, without more, does not give rise to a self-executing privilege. The result may be different if the questions put to the probationer, however relevant to his probationary status, call for answers that would incriminate him in a pending or later criminal prosecution. There is thus a substantial basis in our cases for concluding that if the State, either expressly or by implication, asserts that invocation of the privilege would lead to revocation of probation, it would have created the classic penalty situation, the failure to assert the privilege would be excused, and the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution." (*Murphy*, at p. 435.) Yet even in the "classic penalty situation," the probationer's compelled statements would still

be admissible in a probation revocation hearing, as that is not a criminal proceeding and the Fifth Amendment is therefore inapplicable. (*Murphy*, at p. 435 & fn. 7.) Murphy's statements did not fall within the penalty exception. "On its face, Murphy's probation condition proscribed only false statements; it said nothing about his freedom to decline to answer particular questions and certainly contained no suggestion that his probation was conditional on his waiving his Fifth Amendment privilege with respect to further criminal prosecution." (*Murphy*, at p. 437.) Hence, his statements to the probation officer were admissible against him in a criminal prosecution.

In *Maldonado v. Superior Court* (2012) 53 Cal.4th 1112 (*Maldonado*), the California Supreme Court rejected the defendant's claim that the Fifth Amendment provided "a guarantee against officially compelled *disclosure* of potentially self-incriminating information." (*Maldonado*, at p. 1127.) The *Maldonado* court based its holding on the rule that the Fifth Amendment applies only to *use* of a defendant's incriminating statements; the Fifth Amendment does not bar the government from compelling those statements. "[T]he Fifth Amendment does not provide a privilege against the compelled 'disclosure' of self-incriminating materials or information, but only precludes the use of such evidence in a criminal prosecution against the person from whom it was compelled." (*Maldonado*, at p. 1134.) "[T]he Fifth Amendment privilege against self-incrimination does not target the mere compelled *disclosure* of privileged information, but the ultimate *use* of any such disclosure in aid of a criminal prosecution against the person from whom such information was elicited." (*Maldonado*, at p. 1137.)

The California Supreme Court's decision in *Maldonado* relied on the United States Supreme Court's decision in *Chavez v. Martinez* (2003) 538 U.S. 760 (*Chavez*). *Chavez* was a civil action involving qualified immunity in which the issue was whether a police officer who allegedly compelled statements from the plaintiff could be held liable for violating the plaintiff's civil rights. The plaintiff claimed that the police officer had

violated the Fifth Amendment. The United States Supreme Court produced a plurality opinion and multiple separate opinions rejecting the plaintiff's theory. Justice Thomas wrote the lead opinion. In a section of his opinion joined by three other justices, Justice Thomas stated that compelled statements "of course may not be used against a defendant at trial, [citation], but it is not until their use in a criminal case that a violation of the Self-Incrimination Clause occurs." (*Chavez*, at p. 767 (plur. opn. of Thomas, J.).) "[M]ere coercion does not violate the text of the Self-Incrimination Clause absent use of the compelled statements in a criminal case against the witness." (*Chavez* at p. 769 (plur. opn. of Thomas, J.).) Writing separately, Justice Souter acknowledged that it would be "well outside the core of Fifth Amendment protection" to find that "questioning alone" was a "completed violation" of the Fifth Amendment and declined to extend the Fifth Amendment to such a claim. (*Chavez*, at p. 777 (conc. opn. of Souter, J.).) Thus, in *Chavez*, five justices held that the Fifth Amendment is not violated by the extraction of compelled statements.

As applied to this case, *Murphy* establishes that defendant's Fifth Amendment rights are not violated by the probation condition requiring him to waive the privilege against self-incrimination as to questions asked during the sex offender management program. The state has, "by implication, assert[ed] that invocation of the privilege" in response to such incriminating questions "would lead to revocation" of probation. (See *Murphy*, *supra*, 465 U.S. at p. 435.) Thus, if defendant makes any statements in response to questions posed during the sex offender management program, those statements will be deemed compelled under the Fifth Amendment and thus involuntary and inadmissible in a criminal prosecution. (*Murphy*, at 435.) In short, since such statements will necessarily fall within the penalty exception, they will not be available for use at a criminal prosecution, and defendant's Fifth Amendment rights have not been violated. (See *Chavez*, *supra*, 538 U.S. at p. 769 (plur. opn. of Thomas, J.) [the Fifth

Amendment is not violated absent use of the compelled statements in a criminal case against the witness]; *Chavez* at p. 777 (conc. opn. of Souter, J.).)

In sum, I believe that we are bound by *Maldonado* and *Chavez* (see *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), and they hold that the mere extraction of compelled statements does not violate the Fifth Amendment. Since the challenged probation condition does not purport to authorize the *use* of any statements against defendant in a criminal proceeding, it does not violate the Fifth Amendment.

Simply put, because the penalty exception will necessarily apply to statements that defendant makes in response to questions asked as part of the sex offender management program under compulsion of the section 1203.067, subdivision (b)(3) probation condition, the condition itself does not violate the Fifth Amendment.

As to the waiver of the psychotherapist-patient privilege, in the Sex Offender Punishment Control and Containment Act of 2006 (§ 290.03), the "Legislature [found] and declare[d] that a comprehensive system of risk assessment, supervision, monitoring and containment for registered sex offenders residing in California communities is necessary to enhance public safety and reduce the risk of recidivism posed by [sex] offenders." (§ 290.03, subd. (a).)

Accordingly, the Legislature amended section 1203.067 to provide a collaborative approach to sex offender management known as the "Containment Model." As the analysis of Assembly Bill 1844 explains, "The Containment Model calls for a collaborative effort of sex offender specific treatment providers, law enforcement supervising agents such as probation officers or parole agents, polygraphists providing specialized testing as both a treatment and monitoring tool and victim advocacy participants whenever possible. The offender is supervised and overseen within this context." (Sen. Com. on Public Safety, Bill Analysis of Assem. Bill No. 1844 (2009-

2010 Reg. Sess.) June 29, 2010, available on line at <http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_1801-1850/ab_1844_cfa_20100628_141315_sen_comm.html>)

As of July 1, 2012, the Containment Model is mandatory. (§§ 290.09, 1203.067, 3008 & 9003.)

The Legislature has explained that the purpose of the waiver of the psychotherapist-patient privilege is to "enable communication between the sex offender management professional and supervising probation officer." (§ 1203.067, subd. (b)(4).) Such a waiver supports the compelling state interest in "enhanc[ing] public safety and reduc[ing] the risk of recidivism posed by [sex] offenders." (§ 290.03, subd. (a).)

Since the Containment Model calls for a collaborative effort of sex offender specific treatment providers, which includes polygraphists providing specialized testing as both a treatment and monitoring tool, limiting disclosures to the probation officer would effectively eliminate such a treatment and monitoring tool. The substance of the psychotherapist-patient communications may require verification or investigation by the polygraphists.

Simply put, for the Containment Model of sex offender management to be effective, there must be open and ongoing communication between *all* professionals responsible for supervising, assessing, evaluating, treating, supporting, and monitoring sex offenders. The absence of open and ongoing communication between these professionals and other involved persons could compromise the purpose and efficacy of the containment team approach and as a result jeopardize the safety of the community. Accordingly, I would not construe the waiver of the psychotherapist-patient waiver as narrowly as does the majority.

ELIA, J.